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SUBJECT: KROES CABINET CHEF ON ORACLE-SUN, BANKING
REVIEWS, NEXT COMMISSION DYNAMICS

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SUMMARY

¶1. (SBU) Anthony Whelan, chef du cabinet to Competition Commissioner Neelie Kroes, told USEU November 20 that Kroes and DG COMP are carefully reviewing the complex arguments involved in the Oracle-Sun merger, and the potential concerns over Oracle's acquisition of Sun's MySQL open source database. Key issues Kroes is reviewing include whether: MySQL's open source nature protects it from competition concerns (Kroes is skeptical); DG COMP concerns that Oracle wouldn't support developing MySQL into a stronger competitor to other existing lower-end databases; and interest in Oracle arguments that MySQL technically cannot be scaled up far enough to compete with some of these databases. He noted that Kroes and DG COMP officials' minds "are more open" to Oracle/Sun arguments than they would be in many SO cases, given the new open source issues involved.

¶2. (SBU) Whelan said Kroes regretted missing the recent TEC meeting and continues to value her close relationships with U.S. competition officials. He said she has spent a tremendous amount of time on state aid reviews of the many financial sector bailout packages member states have enacted during the financial crisis. He said the Commissioner and DG COMP have no master plan for the state aid reviews, and acknowledged the importance of looking at the cumulative impacts of required actions on the banking sector. Whelan noted the increasing possibility that Kroes will be reappointed to serve in the next Commission, mentioning rumors she could get the trade portfolio. END SUMMARY.

TEC AND COMPETITION CONSULTATIONS

¶3. (SBU) EconMin opened by mentioning the success of the recent Transatlantic Economic Council (TEC)

meeting and noting it was unfortunate that Commissioner Kroes had been unable to participate. Whelan said Kroes had been looking forward to participating in the TEC and explaining Commission reviews of financial sector support packages, but at the last minute had needed to stay in Brussels to address some of those very reviews.

14. (SBU) EconMin noted the long history of cooperation in competition policy issues, and expressed disappointment that the the planned U.S.--EU competition consultations had to be postponed. He noted USEU's commitment to continuing to facilitate close relations between our respective competition authorities. Whelan said Kroes and DG Comp feel the same, noting Kroes' subsequent meeting in India with FTC Commissioner Kovacic, as well as Deputy Director for Antitrust Nadia Calvino's recent meeting in DC with DOJ Deputy AAG Molly Boast.

FINANCIAL SECTOR STATE AID REVIEWS

15. (SBU) Whelan explained that Kroes has spent a tremendous amount of time on state aid reviews of the many financial sector bailout packages member states have enacted during the financial crisis. He acknowledged that the results may lead to some transatlantic disinvestments and pullbacks. The Commissioner and DG COMP have no master plan for the state aid reviews, but Whelan agreed the Commission should probably look at the cumulative impacts of required actions (such as divestments by ING and

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RBS) on the EU and transatlantic banking sector. He noted the Commission's declared intention when adopting its restructuring guidelines that measures should not undermine the EU internal market. He pointed out that the Commissioner does not insist on divestment of assets in particular regions (ex. E. Europe) and in fact wants to ensure member states do not "close" EU financial markets.

16. (SBU) Whelan explained that the state aid reviews involve twice weekly joint meetings by DG COMP, DG MARKT, DG ECFIN and the Commission legal services to examine member state packages. He said when the crisis hit last year DG COMP quickly received more resources to conduct the reviews, noting they hired former bankers and other experts to assist with the reviews. He added that many of the guarantee and recapitalization schemes have already been reexamined at least once, to ensure they are working and are not market-distorting.

ORACLE-SUN MERGER

17. (SBU) After discussing state aids and Commission politics (below), Whelan turned to the Commission's investigation of the planned \$7.4 billion Oracle-Sun merger. He said Oracle had requested an 8-day extension to prepare their written and possible oral responses to the Commission's Statement of Objections (SO). This is a positive sign, he said, that they are taking the Commission process seriously. He said that some on the DG COMP case team felt Oracle had been "lazy" in its responses to requests for information, but agreed Oracle may not have expected the database concerns, since the early focus had been on potential JAVA issues. He said concerns about Sun's MySQL open source database were brought to DG COMP by questionnaire responses from other parties over the summer.

¶ 8. (SBU) Whelan acknowledged that Sun and Oracle are concerned that the issuance of an SO is a serious step, since very few mergers with SOs have been cleared unconditionally, but added that each case is totally different and that Oracle-Sun presents new issues for DG COMP in involving open source software models so extensively.

¶ 9. (SBU) Whelan understands Oracle's existing databases and MySQL have different architecture and target different markets. He noted that Kroes and DG COMP know the argument that open source software is by definition "pro-competitive," since the theory is that everyone has access to it and can contribute to improving open source programs, but said the Commission is examining subtle and complex counterarguments to this. He said that in the dynamic, real marketplace in Europe, this open source argument needs to be examined.

¶ 10. (SBU) Key questions DG COMP is considering in this case, Whelan said, include: 1) whether the "global public license" open source nature of MySQL somehow precludes potential competitors from using it to develop commercial products that could eventually compete with Oracle's databases; 2) in this connection, Oracle's assertions that technically MySQL cannot be scaled up to compete on Oracle's high end; and 3) whether Oracle has the incentive to support development of MySQL into a stronger program.

¶ 11. (SBU) These concerns, Whelan said, are to some extent hypothetical, but then added that the Commission's merger control powers differ from those

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held by DOJ and FTC in the U.S. In the U.S., he said, agencies can come back to a merger after it occurs, see the results, and take structural action if necessary. The Commission doesn't have that possibility, he continued. The Commission faces an incredibly high bar for subsequent action, he said (if it can show an Article 82 violation that can't be fixed by a behavioral remedy); hence the need for a thorough review now.

¶ 12. (SBU) Whelan continued musing about whether the specific type of open source license MySQL has works well in practice; he noted that the most successful open source products often have a commercial sponsor, (ex. Red Hat), which allows for dual licensing. The Commission's concern is not so much that MySQL would be re-privatized, but rather that Oracle might not provide strong support for the program. The Commission does recognize, Whelan said, that strong support for MySQL from Oracle could make the database a stronger competitor to Microsoft and other lower-end database providers.

¶ 13. (SBU) Whelan stressed that, given the newness of many of the open source issues involved in the case, "our minds are more open" than they tend to be in standard cases where an SO has been issued. He said Oracle has the opportunity to demonstrate answers to many of the questions raised by the Commission (such as whether MySQL can technically be upgraded to be a major competitor to Oracle's existing databases.)

MICROSOFT UPDATE

¶ 14. (SBU) Whelan said that the 4-week market test of Microsoft's proposed "ballot-screen" remedy to the Commission's case against Microsoft's bundling of

Internet Explorer with Windows concluded last Friday (Nov. 13). He said the ballot screen results (under which MS will offer a screen with alternate internet browsers that Windows users can download) showed some small concerns over screen design, layout, the number of security warnings Windows showed users installing new browsers, and one or two other small issues. Whelan said "we need to explore these with Microsoft" but implied that they were not major issues, and reinforced the impression that Commissioner Kroes sees this case as nearly resolved.

KROES IN THE NEXT COMMISSION

¶15. (SBU) Whelan said that while three weeks ago there seemed to be zero possibility of Kroes being reappointed to the Commission, the Dutch political dynamic has since changed. Kroes is very media-savvy in the Netherlands, Whelan noted, and the Dutch media have begun a campaign to renominate her. The government is "in the doldrums," he said, and there is public resistance to sending one of Prime Minister Balkenende's "party hacks" to the Commission. Kroes is seen as tough on banks, which is appealing, he added, and PM Balkenende is now under some pressure to support Kroes. Whelan concluded that her chance of reappointment has grown. (Note: Kroes was subsequently reappointed by the Dutch government on November 24. End note). Whelan acknowledged the rumor that Kroes would get the trade portfolio but said he had no corroboration of this at all.

MURRAY